Supreme Court, U.S.
FILED
APR 22 1996
CLERK

No. 95-1311

In The

Supreme Court of the United States

October Term, 1995

PIETRO PARRAVANO, et al.,

Petitioners,

v.

BRUCE BABBITT, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, FLORIDA, IDAHO, KANSAS, MASSACHUSETTS, MISSOURI, NEBRASKA, NEVADA, NEW YORK, NORTH DAKOTA, RHODE ISLAND, SOUTH DAKOTA, VERMONT, AND WYOMING IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the federal government may take, in derogation of a State's sovereign interests, a percentage of a State's fish and game and allocate it to an Indian tribe without any express authority in treaty, federal statute or executive order.

2. Whether a federal court may imply rights, not expressly granted by the Congress, for a priority allocation of fish in the Klamath River to non-treaty Indian tribes.

3. Whether the federal government may exercise jurisdiction over a State's fish and game *outside* of an Indian reservation for the benefit of an Indian tribe, particularly where Statehood precedes the creation of the Indian reservation.

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INTEREST OF AMICI CURIAE STATES

This case has placed the States of the Union in a serious conflict with the federal government over the role of the federal government in protecting resources for the benefit of Indian tribes. The decision below permits the Secretary of Interior, without the benefit of a treaty provision, statute or executive order, arbitrarily to allocate a set percentage of fish to be taken on-reservation by a non-treaty Indian tribe, where that tribe has no right to the allocation of fish in common with others under any treaty, law or order. The alarming import of the decision below is that the federal government need not look to Indian treaties to justify the federal regulation of fish and game resources *outside* Indian lands. Under the decision below, the federal government may preempt or override State regulation of fish and game *off-reservation* – on private lands, state lands or anywhere within a state where fish and game might have cause to migrate within the State – in violation of the Tenth Amendment of the United States Constitution.

Amici States have now, or may have in the future, non-treaty Indian reservations created by statute and/or executive order. In California, *all* reservations arose *after* statehood, none by treaty. Some of these States also have treaty Indians living on reservations, whose rights to hunt and fish, on- and off-reservation, are defined by the language and terms of the treaties entered into between these tribes and the United States. Many of these treaties were entered into *before* the statehood of the respective State, and the interests of the State, on- or off-reservation, were undoubtedly displaced to the extent that the treaty

specifies. However, this is not the case with Indian reservations created from the federal public domain or patented lands in an existing State of the Union. While the federal government may preempt certain state regulation on federal lands, including those reserved for the benefit of Indian tribes, no authority stands for the proposition that the federal government may allocate resources *outside those lands* for the benefit of those occupying the reservation. The decision below misreads the pertinent authorities, and thereby improperly expands the powers of the federal government, threatening sovereign State interests.

Amici States believe this Court must review and reverse the decision below in order to protect and preserve the States from federal intrusion where Congress has not spoken. Amici States further believe that Congress does not have the power under the Indian Commerce Clause of the United States Constitution to allow federal jurisdiction over a State's fish and game resources outside of an Indian reservation, for the benefit of the tribe on the Indian reservation, absent a pre-statehood treaty which specifically reserve such a right.[1] The

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[1] The unprecedented federal approach would also tend to eviscerate the consistent holding of this and other courts which hold that an off-reservation hunting and fishing right is not preserved, in the absence of specific savings language, when a reservation is diminished or disestablished. See, Oregon Department of Fish and Wildlife v. Klamath Tribe, 473 U.S 753, 768-770 (1985); Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161, 1162 (8th Cir. 1980) aff'g., United States v. Minnesota, 466 F.Supp. 1382 (D. Minn. 1979), cert. den., 449 U.S. 905 (1980); State v. Hero, 282 N.W.2d 70, 71 (SD 1979). See, American Indian Law Deskbook (Conf. of Western Attys.

exercise of such jurisdiction violates the Tenth Amendment, which reserves powers not delegated to the federal government to the States.

SUMMARY OF ARGUMENT

The federal government has asserted in this case a power to allocate a set percentage or number of the fall Chinook run of salmon in the Klamath River to a non-treaty Indian tribe, arising from an "implied" right to a set amount of fish. The Court of Appeal decision permits the Secretary of Interior, without the benefit of a treaty provision, statute or executive order, arbitrarily to allocate a set percentage of fish to be taken on-reservation, where that tribe has no right to the allocation of fish in common with others under any treaty, law or order.

Amici States argue that the federal government may not preempt or override State regulation of fish and game *off-reservation*, as it has no power to do so, and any such assertion of a power is in violation of the Tenth Amendment of the United States Constitution. While this Court has recognized an implied right to water in the federal government for the benefit of Indian tribes, such rights implied from agreements or treaties with Indian tribes, this Court has never recognized a *Winters*-like implied

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Gen. 1993), 215-219. The decision below has the effect to accomplish by litigation what the tribes failed to accomplish in the Congress recently. S. 1526, the proposed Indian Fish and Wildlife Resources Management Act of 1994, would have established a federal authority to regulate off-reservation hunting and fishing, similar to what is sought here.

right for Indian tribes to a set amount of fish to be taken in common with others, particularly where the Indian reservations post-date the statehood of the State involved.

Amici States recognize that in this case, the federal government may displace state jurisdiction and regulatory interests *on-reservation*, and therefore, the Klamath River tribes have "federally-protected" fishing rights *on-reservation*. However, no tribe has, under this Court's jurisprudence, "federally-reserved" fishing rights that give rise to an allocation of the State's resources to be taken from the river and the state's coastal waters, except under certain adjudicated treaty cases. The Court of Appeals and the district court below relied on various Pacific Northwest treaty cases, where pre-statehood treaties reserved to the tribes rights to fish off-reservation "in common with all Citizens of the Territory," to conclude that non-treaty, post-statehood tribes warrant the same treatment and justify an allocation of fish in common with others. Absent a treaty akin to those in the Pacific Northwest, there is no basis to assume that the federal government has the authority to restrict off-reservation activities by third parties in order to guarantee that the tribes' opportunity to fish will provide a particular quantity of fish. There is no language in treaty, statute or executive order that supports the tribes receiving a priority "share" or "fair share" of the salmon, and thus, there is no power in the federal government to allocate fish as occurred in this case. The assertion of federal power in this case is a direct affront to the reserved powers of States to regulate and manage fish and game

not otherwise subject to prior treaty rights and not otherwise on the Indian reservation. This Court should grant review to reverse and rectify the improper displacement of State power by the federal government.

ARGUMENT

I.

THIS COURT SHOULD GRANT THE WRIT TO REVIEW A NEWLY- IMPLIED FEDERAL RIGHT TO A PRIORITY ALLOCATION OF FISH FOR A NON-TREATY INDIAN TRIBE, TO BE ENFORCED BY THE FEDERAL GOVERNMENT OFF-RESERVATION, WHERE THE STATUTES AND EXECUTIVE ORDERS GIVE RISE ONLY TO FEDERALLY-PROTECTED RIGHTS TO FISH ON-RESERVATION

Amici States urge this Court to grant certiorari to review important questions concerning the balance of federal-state power implicated by the findings and holdings of the district and circuit courts below. The lower courts upheld the emergency regulations of the Secretary of Commerce overruling the regulations of the Pacific Fisheries Management Council that set the Klamath fall chinook ocean harvest rate. *Parravano v. Masten*, 70 F.3d 539 (9th Cir. 1995) (*"Masten"*) (adopting the reasons and holdings of the district court); *Parravano v. Babbitt*, 861 F.Supp. 914 (N.D. Cal. 1994); *Parravano v. Babbitt*, 837 F.Supp. 1034 (N.D. Cal. 1994). Preliminarily, it should be noted that the Secretary of Commerce must manage the ocean fishery in the Exclusive Economic Zone (EEZ), from 3 to 200 miles seaward, under the provisions of the Magnuson Act, 16 U.S.C. § 1801 *et seq.*, and in a manner

consistent "with any other applicable law." 16 U.S.C. § 1854(a)(1)(B). The courts below held that "any other applicable law" included "[federal] obligations to Indian reservations with respect to fishing rights," *Masten*, at 547; *Parravano v. Babbitt*, 837 F.Supp. at 1042-44; *Parravano v. Babbitt*, 861 F.Supp. at 925, as defined in an opinion of the Solicitor of the Department of Interior, dated October 4, 1993. While it is clear that as a general proposition the federal government may regulate ocean fishing under the commerce power, its exercise of power in this instance is flawed by an improper characterization of the fishing rights of the Hoopa Valley and Yurok Indians.

As to the scope and import of the protected fishing rights of the non-treaty Indians in this case, the courts below relied heavily, if not exclusively, on the flawed opinion of the Interior Solicitor. Admitting that it was a matter of first impression, the Interior Solicitor not only drew the conclusion that non-treaty Indians are entitled to similar fishing rights as "treaty" Indians (without identifying *which* treaty or *which* treaty Indians), he presumed it was within the power of the federal government to "allocate" from the entire Klamath run, *on- and off-reservation*, the number or percentage of fish the non-treaty Indians are entitled to. The Solicitor drew on the facts, experience, and the interpretations of various Pacific Northwest Indian treaties and the case law interpreting those treaties to determine that the Klamath River Indian tribes, in the absence of a treaty, were entitled to not more than 50 percent of the salmon in the fall chinook run. The courts below followed the Solicitor's opinion and held that the Hoopa and Yurok Indians have "federally *reserved* fishing rights," (italics added) and that to protect

these rights, the restrictions on ocean fishing of salmon were justified. *Babbitt*, 861 F.Supp. at 924. However, a close examination of the facts and the cases on which this chain of assertions and conclusions is based indicates that there is no "reserved" right, as found in treaty cases, but only a "protected" right relating to the ability of the tribes to fish on the reservation *free from the interference of others*. The immunity from state regulation which these tribes enjoy for on-reservation fishing does not support a 50 percent allocation of the entire fall chinook run, a curtailment of ocean fishing, or any other federal interference in off-reservation fisheries for the benefit of non-treaty Indians fishing on-reservation.

II.

THIS COURT SHOULD GRANT THE WRIT TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW WHERE STATE SOVEREIGN INTERESTS ARE THREATENED

A. The Klamath River Tribes have only "federally-protected" on-reservation fishing rights, not "federally-reserved" fishing rights that give rise to an allocation of the State's resources in the river and in State coastal waters

The history of the Indian reservations on the Lower Klamath River in California is set forth in *Mattz v. Arnett*, 412 U.S. 481, 487-493 (1973). No treaty was concluded with the Klamath Valley tribes in California. The present Hoopa Valley Reservation, the Lower Klamath Reservation and the "connecting strip" (now part of the Yurok Reservation) were all created by executive orders after California became a State. *Mattz*, at 487-490, 493. Unlike

the tribes in the Columbia River Basin (or the Upper Klamath River in Oregon), the Klamath River tribes in California have no treaty fishing rights. Compare *Washington v. Washington State Commercial Fishing Vessel Assn.*, 443 U.S. 658, 675-685 (1979); *Oregon Dept. of Fish & Game v. Klamath Indian Tribe*, 473 U.S. 753, 773 (1985); *Kimball v. Callahan*, 493 F.2d 564, 566-567 (9th Cir. 1974).

The courts below held that a "federally reserved fishing right" for the Lower Klamath River Indians was confirmed in *United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986). In that case, however, both the defendants and the United States simply asserted that the tribes had federally reserved fishing rights. The federal government contended it had the authority to curtail those rights, at least as to commercial fishing, in order to protect the resource. The Court accepted the assertion of a federally reserved right, basing it on language in the state court decisions in *People v. McCovey*, 36 Cal.3d 517, 534 (1984) and *Arnett v. Five Gill Nets*, 48 Cal.App.3d 454, 461 (1975).[2]

Yet, the language in those state cases is overbroad dicta. The cases that established the principle that tribes acquired reserved rights in fishery and water resources when their Indian reservations were created, did so based on *treaties* between the tribes and the United States. In *United States v. Winans*, 198 U.S. 371, 381 (1905), which concerns fishing rights, the Court held that when tribes

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[2] In fact, *McCovey* speaks in terms of the "grant" of fishing rights, arising from congressional action authorizing the President to create the reservation for Indian purposes. 36 Cal.3d 517, 205 Cal. Rptr. 643, 685 P.2d 687, 697 (1984).

ceded lands to the United States in treaties or agreements, they (the tribes), *reserved certain rights to themselves*, including fishing rights. However, in *Winters v. United States*, 207 U.S. 564, 575-577 (1908), concerning water rights, the Court went further and *implied* federal reserved water rights, where they were not explicitly reserved, for the Fort Belknap Reservation for the consumptive purpose of agriculture to support the Indians. Because of the rule that agreements with tribes should be construed liberally in favor of the tribes, in neither case was the Supreme Court willing to construe the treaty as having failed to reserve such rights to the tribes if the rights were not specifically mentioned. This analysis was followed in *Menominee Tribe v. United States*, 391 U.S. 404, 405-406 (1968). Whether explicit or implicit, the "reserved rights" that these cases held were created when the reservation was created were rights reserved *by the tribes* from their sovereign rights when they entered into treaties or agreements with the United States in which lands were ceded and other concessions were made, and such rights operate only to the extent they exist. This Court has never held that a post-statehood establishment of a federal reservation gives rise to a *Winters*-like *implied* federal reserved *fishing* right, subject to allocation among others by the federal government.

Under the "equal footing" doctrine, once States are admitted to the Union, they acquire title to lands and waters not reserved in the public domain by the United States *prior to statehood*, thus placing them on an "equal footing" with the original States. See *United States v. New Mexico*, 438 U.S. 696, 698-703 and n. 4 (1978). The Supreme Court in *Winters* held that the "equal footing"

doctrine did not defeat the tribes' claim to reserved water rights created by a treaty entered into a year prior to statehood.

In *Arizona v. California*, 373 U.S. 546, 599-600 (1963), this Court found a different basis for "reserved water rights." Instead of relying on a *tribe*'s reservation of rights in a treaty (as in the instant case, there was no treaty), this Court found that the *federal government* had reserved water rights when it created the Indian reservations from the public lands. *Id.* Hence, the "reserved water rights" doctrine came to be based exclusively on *federal* sovereignty under the property clause and the commerce clause, rather than on Indian sovereignty. U.S. Const., art. I, § 3, art. IV, § 3(2). The arid conditions in most of the West, which would render many public lands useless without water, were fundamental to that decision. 373 U.S. at 597-600. However, this Court did not give the federal government plenary power to reserve water rights in this fashion. Indeed, the federal government's ability to assert such "reserved rights" in scarce resources is quite limited. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. at 685-686; *United States v. New Mexico*, 438 U.S. 696, 698-703 and n. 4, n. 7.

In any event, none of the cases referred to by the courts below dealing with reserved rights actually holds that the federal government may create "reserved *fishing* rights" through the establishment of a reservation, or that

such rights may be reserved other than by treaty.[3] Yet, the Interior Solicitor and the courts below concluded that the establishment of the reservation must have given rise in the tribe to a *priority*, before other user groups can be afforded fishing privileges. This astonishing leap of logic bestows a treaty-like priority in fish resources to the tribe where no law, treaty or authority stands for that proposition.

B. Non-Treaty Indians May Have Federally-Protected Rights to Fish *On the Reservation* In This Case

Both the distinction between treaty rights and statutory rights, and the timing of the creation of the reservation relative to statehood, are significant points, in light of the "equal footing" doctrine. The federal government may have created Indian reservations for the Klamath River tribes from federal public lands after California became a State, thus ousting the State of jurisdiction to enforce its fish and game laws on the reservation, *Mattz v. Superior Court*, 36 Cal.3d 355, 363-364, 372-373 (1988), except where necessary to preserve the resource. *Id.*, at 374, 376-380. But it did not, and could not, create a

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[3] While *Blake* v. *Arnett*, 663 F.2d 906, 909-910 (9th Cir. 1981), described the distinction between reserved rights created by treaty and those created by statute to be illusory, the point is dicta, because the actual holding of the case is that whatever right the Indians had in the lands adjoining the Klamath River, it was transferred to those who later acquired the land. *Id.* at 911. In any event, the discussion in *Washington* v. *Washington State Fishing Vessel Assn.*, which is clearly based on interpreting the rights the Washington State Indians reserved in a series of treaties, does not support a blurring of this distinction. 443 U.S. at 674-684.

"federally reserved fishing right," certainly not one that justifies restrictions on other activities, such as ocean fishing, that may impinge on the tribes' exercise of that right, after California became a State in the absence of a treaty. See *United States v. New Mexico*, 438 U.S. at 698, 705-713.

Again, this point is clearly illustrated by comparing the instant case to *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658. In that case, the United States had entered into a series of treaties to extinguish claims to land in the Columbia River Basin. 443 U.S. at 661-662. (One was the treaty interpreted in *United States v. Winans*, 198 U.S. 371, 381.) In all of them, the tribes reserved, by language of a treaty, a right to fish at usual and accustomed places "in common with all Citizens of the Territory." 443 U.S. at 674. It was this language which the state and federal courts interpreted as allowing "an equitable measure of the common right," leading to an allocation of a percentage of the salmon and steelhead runs to the treaty tribes. 443 U.S. at 678-685. Moreover, the allocations themselves were based on an extensive evidentiary record. *Id.* at 685-691. They were not pulled out of the air or based on cases from other areas with other factual circumstances, as is the case here.

III.

THIS COURT MUST SETTLE THE QUESTION WHETHER, IN THE ABSENCE OF A TREATY ALLOCATING RESOURCES TO AN INDIAN TRIBE, THE FEDERAL GOVERNMENT HAS ANY JURISDICTION TO PROVIDE FOR OFF-RESERVATION RESTRICTIONS OR ALLOCATIONS OF A STATE'S RESOURCES

Where the federal government may have ousted California of jurisdiction to enforce its fish and game laws against the Klamath Indians fishing *on their reservation* (except where necessary to protect a dwindling resource), in that since the Klamath tribes have a "federally guaranteed" fishing right by virtue of the creation of their reservations. This is a far cry from those situations in which the U.S. Supreme Court has found a *reserved* fishing right. A *reserved* fishing right may be created only through a treaty. Absent some treaty language creating a priority, or an in-common right, as in the Washington State cases, there is simply no basis for concluding that the tribes have a right to an *allocation* of Klamath River fish. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. at 685. Rather, they have a right to fish on their reservation and they enjoy an immunity from state fish and game laws on their reservation. No amount of legerdemain by the Interior Solicitor can supply the missing predicate.

Moreover, absent a treaty basis for the tribes' right, as in the Washington State cases, there is no basis to assume that the federal government has the authority to restrict off-reservation activities by third parties in order

to guarantee that the tribes' opportunity to fish will provide a particular quantity of fish.[4] While the Court of Appeals makes no note of it, the District Court acknowledged the "off-reservation regulation of a fishery pursuant to non-treaty based tribal fishing rights appears to be a matter of first impression. . . . " *Babbitt*, 861 F.Supp. at 924. In fact, any quantification of non-treaty federally reserved on-reservation Indian fishing rights has no precedent. The same district court cited *Blake v. Arnctt*, 663 F.2d 906, *United States v. Wilson*, 611 F.Supp. 813 (N.D. Cal. 1985) and *United States v. Walker River Irr. Dist.*, 104 F.2d 334 (9th Cir. 1939). These cases do not stand for the proposition that treaty and non-treaty rights are to be treated the same. In *Walker River*, this court simply followed *Winters* to imply an implied federal reservation of water for the benefit of the Paiute tribe with a priority dating from before Nevada became a State. The case does not stand for the broad proposition that non-treaty fishing rights are to be treated the same as treaty fishing rights. The decision in *Wilson* was eviscerated in part by the holding in *United States v. Eberhardt*, 789 F.2d 1354. The use of the term "reserved" rights is not essential to

[4] Other factors besides ocean fishing are sometimes thought to have affected the decline of North Coast salmon runs. Although the Solicitor's opinion mentions water diversions (primarily federal) on the Klamath and its tributaries as another candidate for remedial action, timber harvesting (particularly of old growth forest in spawning and rearing areas) on both private and National Forest land is also often named as a suspect. Presumably the "federally reserved fishing right" asserted here could be used to justify federal regulation of private, as well as federal, timber harvesting to protect the salmon runs.

Eberhardt – this Court of Appeals found there that the tribes had protected rights to fish, but that the general trust statutes in Title 25 furnished the Department of Interior with broad authority to supervise and manage Indian fishing *on the reservation*. *Eberhardt*, at 1360-1361.

What is significant, if not obvious, about treaty fishing rights as opposed to non-treaty rights is that they generally specify what the treaty tribe is retaining or reserving as a right to fish, as in the right to fish at "usual and accustomed places" "in common with all Citizens of the Territory." *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. at 674. The Solicitor and the district court here cannot read such language into a treaty that does not exist. By analogizing the Klamath River Indian fishing rights to federally-reserved water rights, and by applying the "fair share" and off-reservation aspects of Washington state *treaty* fishing rights to these non-treaty Indian fishing rights in California, the courts below have fashioned an extraordinarily expansive new power in the federal government relating to Indian affairs. When the Court of Appeals posits that the Tribe must receive its "fair share," 70 F.3d at 546, it is premised on the notion that the tribe has the right to a "share." With whom? and from what? *Treaties* typically reserve rights to the tribe to a share of fish "in common" with others in whatever geographic locations those others may be in, e.g., at "usual and accustomed places" off the reservation. The States and the non-Indian citizenry took their interests subject to these treaty rights. No such priority rights arise in a non-treaty situation. If non-treaty fishing rights indeed arise from the federal grant of rights in the creation of a reservation, then it is clear that the

federal government may regulate, manage and supervise that Indian fishery.

Existing constitutional powers to manage federal property do not, however, give the federal government power to regulate, manage and supervise non-Indian fisheries for the benefit of Indian fisheries, absent a treaty that compels it.[5] As noted, what is disturbing to the States in the decisions below, and in the Interior Solicitor's opinion that the decision tracks, is the logical extension that the federal government may rely on its general trust responsibilities to Indians and its property powers to justify the *federal* regulation of fish and game resources outside Indian lands. Under the reasoning of this decision, the federal government may preempt or override *state* regulation of fish and game off-reservation – on private lands, state lands or, presumably, anywhere that the federal government deems "linked" to an implied "reserved," higher-priority Indian right to fish or hunt. To the extent that such a reading of federal power permits the preemption of state regulation where no constitutionally-derived or treaty power grants it, it is violative of the Tenth Amendment, which reserves powers not delegated to the United States to the States.

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[5] The Supreme Court has recognized that even where the right is a treaty-based, in-common right, there are limits to how much of the resource may be allocated to the tribes. *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. at 684-687. See also *United States* v. *New Mexico*, 438 U.S. at 698-703 and n. 4, n. 7. However, where there is *no* treaty, and the reservation was created after statehood, there is no reserved right and no basis for *any* allocation.

CONCLUSION

For the reasons stated here, amici States urge this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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